IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. ~~266~~ 28

Jud. Statement not printed
Appendix not printed

LELIA MAE SANKS nee JONES, *et al.*,
Appellants,

—v.—

GEORGIA, *et al.*,
Appellees.

APPEAL FROM THE SUPREME COURT OF GEORGIA

APPELLANTS' BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 266

LELIA MAE SANKS nee JONES, *et al.*,

Appellants,

—v.—

THE STATE OF GEORGIA, *et al.*,

Appellees.

APPEAL FROM THE SUPREME COURT OF GEORGIA

APPELLANTS' BRIEF

Appellants appeal from the judgment of the Supreme Court of Georgia, entered on January 23, 1969, reversing the order of the Civil Court of Fulton County which held unconstitutional Sections 61-303 and 61-305 of the Code of Georgia (1933) (Section 61-305 as amended by 1947 Georgia Laws 657) (hereinafter referred to, for the sake of consistency, as Sections 61- 303 and 61-305 of the Georgia Code Annotated (1966)).

Opinion Below

The opinion of the Supreme Court of Georgia is reported officially in 225 Ga. 88, and unofficially in 166 SE 2d 19. The opinion of the Civil Court of Fulton County is not reported, and is appended to this brief (A. 27).

Jurisdiction of This Court

The jurisdiction of the Court is derived from 28 U.S.C. §1257(2), authorizing this Court to review cases decided by State Supreme Courts "where is drawn into question the validity of any state statute on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity." In the instant case Appellant challenged, and the Georgia Supreme Court upheld, the constitutionality of §§61-303 and 61-305 of the Georgia Code Annotated.

This proceeding was begun by Appellee-Landlords for the purpose of evicting Appellant-Tenants from private and public housing in Fulton County, Georgia (A. 3, 18). The Landlords' actions were brought pursuant to Ga. Code Ann. §§61-303 and 61-305.

Sections 61-303 and 61-305 enable a landlord to evict his tenant by simply serving the latter with a notice of eviction. The notice need only allege that the tenant occupies the landlord's premises unlawfully or that the tenant has not paid rent which has become due. The only method by which a tenant may appear in court to challenge or refute the allegations of the landlord is to post a bond equal to any damages which might be recovered by the

landlord (§61-303). If the judgment of the court favors the landlord, he must be awarded as his damages twice the amount of rent agreed upon by the tenant and the landlord (§61-305).

Appellant-Tenants challenged §§61-303 and 61-305 under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States. They made their challenge in the Civil Court of Fulton County, Georgia (hereinafter referred to as the Trial Court). The Trial Court held §§61-303 and 61-305 unconstitutional (A. 27). Appellees filed an Appeal of the Trial Court judgment in the Supreme Court of Georgia, which Court is the highest Georgia Court in which a decision of the case could be rendered (A. 2).

The Supreme Court of Georgia, on January 23, 1969, reversed the decision of the Trial Court and held §§61-303 and 61-305 constitutional (A. 40). Appellant's request for rehearing in the Georgia Supreme Court was denied on February 6, 1969 (A. 44). It is from the judgment of the Supreme Court of Georgia that Appellants appeal, by Notice of Appeal filed in the Supreme Court of the United States on February 20, 1969 (A. 2). Appellants' Jurisdictional Statement was filed with the Court on April 23, 1969 (A. 2).

This Court noted probable jurisdiction on June 23, 1969 (A. 45).

Provisions of the United States Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or

abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes Involved

Georgia Code Annotated, Section 61-303

Sec. 61-303. *Arrest of proceedings by tenant, counter-affidavit and bond.*—The tenant may arrest the proceedings and prevent the removal of himself and his goods from the land by declaring on oath that his lease or term of rent has not expired, and that he is not holding possession of the premises over and beyond his term, or that the rent claimed is not due, or that he does not hold the premises, either by lease, or rent, or at will, or by sufferance, or otherwise from the person who made the affidavit on which the warrant issues, or from anyone under whom he claims the premises, or from anyone claiming the premises under him: Provided, such tenant shall at the same time tender a bond with good security, payable to the landlord, for the

payment of such sums with costs, as may be recovered against him on the trial of the case.

GEORGIA CODE ANNOTATED, SECTION 61-305

Sec. 61-305. *Double Rent and Writ of Possession, When.*—If the issue specified in the preceding section (Ga. Code Ann. §61-304) shall be determined against the tenant, judgment shall go against him for double the rent reserved or stipulated to be paid, or if he shall be a tenant at will or sufferance, for double what the rent of the premises is shown to be worth, and such judgment in any case shall also provide for the payment of future double rent until the tenant surrenders possession of the lands or tenements to the landlord after an appeal or otherwise; and the movant or plaintiff shall have a writ of possession, and shall be by the sheriff, deputy, or constable placed in full possession of the premises.

Questions Presented

1. Do Ga. Code Ann. §§61-303 and 61-305 arbitrarily discriminate against all tenants in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Do Ga. Code Ann. §§61-303 and 61-305 unconstitutionally discriminate against indigent tenants in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

3. Do Ga. Code Ann. §§61-303 and 61-305 unconstitutionally deny to tenants in Georgia the due process of law guaranteed by the Fourteenth Amendment to the United

States Constitution by denying to tenants the right to be heard, and the substantive right to litigate?

4. Do Ga. Code Ann. §§61-303 and 61-305 unconstitutionally deny to tenants in Georgia the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution by creating a vague and incomprehensible standard that permits drastic differences in interpretation?

Statement of the Case

This case involves the constitutionality of §§61-303 and 61-305 of the Georgia Code Annotated—the identical statutes which were under attack in *Williams* v. *Shaffer*, 385 U.S. 1037 (1967). In that case, this Court denied certiorari because the tenant had been evicted, rendering the case moot. Mr. Justice Brennan dissented without opinion. The Chief Justice concurred with Mr. Justice Douglas who stated in his dissenting opinion:

> This case involves an important question regarding the right of a poor tenant to remain in possession of his shelter and defend against eviction in a court of law. It is part of the larger problem regarding the inability of indigent and deprived persons to voice their complaints through the existing institutional framework, and vividly demonstrates the disparity between the access of the affluent to the judicial machinery and that of the poor in violation of the Equal Protection Clause. *Ibid.*

In contrast to the *Williams* case, Appellant-Tenants in the instant case remain on the premises. Thus, the Court is free to examine the issues raised by the Georgia statutes.

In compliance with Ga. Code Ann. §§61-303 and 61-305, and other sections not pertinent to this Appeal, Appellants were served by their landlords with notices of eviction (A. 3, 18). Being indigent, Appellants were unable to post the bond required by §61-303, and they therefore applied to the Trial Court for rules nisi (A. 5, 20), where they first raised the federal questions sought to be reviewed in this proceeding. They alleged that §§61-303 and 61-305 violate the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States; and they raised issues under the corresponding provisions of the Constitution of the State of Georgia (Ga. Const. Art. I, §I, Paras. II, III and IV).

The Trial Court entered an Order directing Appellee-Landlords and the Marshal of Fulton County to show cause why Appellants should not be allowed to proceed without subjecting themselves "to the penal rent provisions" of §§61-303 and 61-305 (A. 7, 22). The State of Georgia, which under Georgia law is a statutory party to any action that challenges the validity of a Georgia statute, intervened in each of the proceedings and was made a party of record (A. 24).

The cases were consolidated for hearing, and after holding an evidentiary hearing, the Trial Court held on October 2, 1968, that §§61-303 and 61-305 are an unconstitutional denial of Appellants' rights to due process and equal protection. The Court stated:

> The constitutional guarantee of equal protection of the laws is not subject to a construction which allows a man of means to defend his rights in court while denying the same opportunity to the indigent. The

availability of the court is necessarily open to all—both rich and poor alike. Equal protection of the laws does not permit as a condition precedent for access to the machinery of the courts a bond which a defendant is without means to procure.

The Statute which requires a bond before appearing in court is an unconstitutional and unconscionable deprivation of the fundamental right to be heard where the defendant is unable to post such a bond (A. 38).

The State of Georgia filed its Appeal from the Trial Court's judgment and Order on October 8, 1969 (A. 2). In its Appeal, the State presented the following questions:

(1) Whether the bond-posting requirement of Ga. Code Ann. §61-303 is violative of any right secured to tenants, and in particular indigent tenants, by the "due process" and "equal protection" clauses of the Fourteenth Amendment to the United States Constitution or by the equivalent provisions of the Constitution of the State of Georgia.

(2) Whether the "double rent measure of damages fixed by Ga. Code Ann. §61-305 is violative of any right secured to tenants, and in particular indigent tenants, by the "due process" and "equal protection" clauses of the Fourteenth Amendment to the United States Constitution or by the equivalent provisions of the Constitution of the State of Georgia.

On January 23, 1969, the Georgia Supreme Court rendered the judgment from which Appellants have appealed (A. 43). Their opinion concludes that: "Code §§61-303

and 61-305 do not violate the Fourteenth Amendment to the United States Constitution (Code §1-815) nor the corresponding provisions of the Georgia Constitution (Code §§2-102, 2-103, 2-104, Art. I, Sec. I, Paras. 2, 3, 4 Const. 1945)" (A. 40). The Court further held that:

> the Trial Court erred in holding that Ga. Code §§61-303 and 61-305 were unconstitutional, in allowing the tenants to file their counter-affidavits without first posting the bond required by Code §61-303, and in holding that the tenants be permitted to assert their defenses without being subjected to the double rent provisions of Code §61-305 (A. 43).

The Georgia Supreme Court denied Appellants' request for rehearing on February 18, 1969 (A. 44), rendering final that Court's ruling and bringing Appellants' case within the provisions of 28 U.S.C. §1257(2). Appellants filed Notice of Appeal in the Georgia Supreme Court on February 20, 1969 (A. 2), and filed their jurisdictional statement on April 23, 1969 (A. 2).

This Court noted probable jurisdiction on June 23, 1969 (A. 45).

Summary of Argument

The Georgia eviction statutes permit a landlord to evict a tenant by the simple expedient of obtaining a dispossessory warrant which authorizes a Marshal to evict a tenant summarily unless the tenant files a counter-affidavit stating that he has a right to remain in possession. In order to file such a counter-affidavit, the tenant must post

with the court a bond equal to double the amount of rent "reserved or stipulated to be paid."

This procedure violates the Equal Protection Clause because it discriminates against tenants with valid defenses to a dispossessory action as well as those who are illegally holding over.

The statute also discriminates against the entire category of tenants, as opposed to landlords and other litigants, by requiring only tenants to post a bond as a precondition to the right to appear in court. Such a requirement is not justified by any valid state purpose.

The discrimination effected by the statute is particularly harsh when the tenant is indigent. This Court has held, in a long series of cases beginning with *Griffin* v. *Illinois*, 351 U.S. 12 (1956), that statutory classifications based on wealth or property are "traditionally disfavored" and has further held that where the classification impinges upon a "fundamental right" the State will be required to justify the classification not merely by a showing of a reasonable basis for its enactment but by a "compelling" state interest. No compelling state interest has been shown to justify Ga. Code Ann. §§61-303 and 61-305.

The statutes not only violate the Equal Protection Clause; they also deny to Georgia tenants the Due Process of the laws by depriving tenants of their property without a hearing. This Court's recent decision in *Sniadach* v. *Family Finance Corp.*, —— U.S. ——, 37 U.S.L.W. 4520 (U.S. June 10, 1969) held that a prejudgment taking of wages was an illegal deprivation of property; the deprivation of housing without a hearing is at least as serious as the deprivation in *Sniadach*, and should be struck down under the doctrine in that case.

The statute also runs afoul of the Due Process Clause in that it denies to tenants the right to litigate protected by that clause, and by this Court's decision in the *Button, Railroad Trainmen,* and *United Mineworkers* cases. Finally, the statute's requirement of a bond equivalent to "double the rent reserved or stipulated to be paid" is so vague that men of common intelligence must necessarily guess at its meaning. This vagueness is an unconstitutional denial of the due processs of the laws.

ARGUMENT

POINT I

Georgia Code Annotated §§61-303 and 61-305 Arbitrarily Discriminate Against All Tenants in Violation of the Equal Protection Clause of the Fourteenth Amendment to the United State Constitution.

The State of Georgia has the most oppressive summary eviction law in the United States, for Georgia is the only State in the Union that permits landlords to evict tenants summarily while requiring tenants to post a penal bond in order to be heard in court to contest the summary eviction.*

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* Two other jurisdictions require tenants to post a bond in order to defend against an eviction, but the statutes in both of those jurisdictions are considerably narrower than Georgia's provisions.

Massachusetts requires a bond; but only if there has been a foreclosure of a mortgage.

> Mass. Gen. Laws Ch. 239 §6. Condition of Bond in Action for Possession after Foreclosure. If the action is for the possession of land after foreclosure of a mortgage thereon, the condition of the bond shall be for the entry of the action and payment to the plaintiff, if final judgment is in his favor, of all costs and of a reasonable amount as rent of the land

Under the laws of Georgia, the owner of lands or tenements may evict a tenant by the simple technique of ordering the tenant to vacate, and then, at the expiration of a statutory notice period, signing an affidavit declaring that the landlord has a "right" to the premises. Ga. Code Ann. §61-301. The landlord's unsupported affidavit is the Marshal's authority to order the tenant to move; if the tenant has not moved at the end of four days (six days in Fulton County), Georgia law permits the Marshal to remove him physically.

A tenant wishing to contest this summary eviction is faced with a complicated, expensive, and risky procedure. He may not simply answer the landlord's affidavit by a counter-affidavit asserting his own rights and claims: before he can even be heard by a court, he must tender "a

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from the day when the mortgage was foreclosed until possession of the land is obtained by the plaintiff . . . . Upon final judgment for the plaintiff, all money then due to him may be recovered in an action on the bond.

§6A. Condition of Bond in Action for Possession after Foreclosure of Tax Title. If the action is for the possession of land after foreclosure of a tax title thereon, the condition of the bond shall be for the entry of the action and payment to the plaintiff, if final judgment is in his favor, of all costs and of a reasonable amount as rent of the land from the day when the tax title was foreclosed until possession of the land is obtained by the plaintiff, and of all damage and loss which he may sustain by the withholding of possession of the land or tenements demanded and by any injury done thereto during such withholding.

Nevada requires a bond; but only if the landlord also posts a bond.

Nev. Rev. Stat. §40.300, provides for the issuance of a "temporary writ of restitution." This writ, however, is not issued until the tenant-defendant has been given an opportunity to oppose its issuance, nor until the landlord-plaintiff has filed a sufficient bond of indemnification in an amount fixed by the Court. Nev. Rev. Stat. §40.300,3.

bond with good security, for the payment of such sums, with costs, as may be recovered against him on the trial of the case." Ga. Code Ann. §61-303. Should he subsequently lose his case on the merits, he must pay to the landlord "double the rent reserved or stipulated to be paid." Ga. Code Ann. §61-305. In Fulton County, this statute operates in practice to require a "100% cash bond" (A. 14) equivalent to double the amount of rent that may become due during the period of the litigation, a period arbitrarily defined by the Clerk of the Civil Court of Fulton County as six months.

Thus, a tenant in Fulton County must post a cash bond equal to one full year's rent in order to raise *any* defense against a dispossessory warrant. Should the tenant be unable to post the bond, he has six days from the day he is served to leave the premises or be physically set out by the Marshal.

That this procedure discriminates against all tenants in relation to all landlords is immediately apparent.

A rich tenant with a valid defense to an eviction notice, for example, is discriminated against by the statute because even if he wins his case (indeed, even if the landlord has brought his action in bad faith, has been stubbornly litigious or has caused the tenant unnecessary trouble and expense) he must incur the expense of obtaining a bond and engaging counsel. Even where the tenant's defense is absolute and is sustained by a motion for judgment on the pleadings, an Atlanta tenant, be he individual or corporate, must provide the enormity of a cash bond equivalent to one full year's rent before asserting such a defense. The loss of income suffered by any litigant who must produce

such a sum of money is an important facet of the discrimination created by the statute.

A rich tenant in Georgia may possibly be able to defend himself in a dispossessory action—if he is absolutely certain that he will prevail. But even the richest tenant does not dare go to court in a contested case, for the possible loss of a year's rent is a sanction so dire that it must preclude litigation by all but the most reckless tenants. Needless to say, only a foolhardy attorney would advise his client to litigate under such conditions, although the client's defense might be entirely colorable and supported by a preponderance of the evidence.

If these considerations apply to a rich tenant, how much more conclusively do they apply to a tenant whose funds are limited. An Atlanta family that pays $300 rent for a three bedroom apartment, for example—a solid, middle-class family with the normal financial pressures to which such a family is subject—is obviously in no position to produce $3,600 plus a bonding company's fees before defending a lawsuit, no matter how just might be the family's defense. And a resident of Vine City, one of Atlanta's worst slum areas, need not give a second thought to presenting any defenses in court: he moves out, and moves out fast, or he finds himself moved out by the County Marshal.

As these facts make clear, Georgia's statute discriminates not only against tenants who wrongfully hold over, or those who hold over with a claim of right that is later rejected by a court, but against all tenants, even those whose claim of right is upheld in litigation. And this discrimination is imposed in addition to another Georgia statute that makes

defendants liable for costs where they have litigated in bad faith.*

The first constitutional defect of the Georgia eviction statute, therefore, is the fact that it arbitrarily discriminates against all tenants, including tenants who litigate in good faith.

This Court held only last term that such discrimination is a violation of the equal protection of the laws. In *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) MR. JUSTICE BRENNAN wrote the Court's opinion holding that the one year residency requirement for AFDC eligibility imposed by all but eleven jurisdictions violated the Equal Protection Clause in that it interfered with the "fundamental right of interstate movement," and did not promote that compelling state interest necessary to justify an interference with a constitutional right.

Addressing itself specifically to the argument that a residency requirement provides the states with a safeguard against fraudulent receipt of benefits, the Court pointed out that

> Since double payments can be prevented by a letter or a telephone call, it is unreasonable to accomplish this objective by the blunderbuss method of denying assistance to all indigent newcomers for an entire year. *Id.* at 637.

In *Shapiro*, a State law was thus found unconstitutional when the Court determined that the law was so broad that

* Ga. Code Ann. §20-1404 states that the expenses of litigation are not generally allowed as a part of damages; but if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused plaintiff unnecessary trouble and expense, the jury may allow them.

innocent newcomers as well as potential wrongdoers were penalized by its provisions. And the Court there noted the unreasonableness of enacting a "blunderbuss" statute to prevent wrongdoing when an alternative method is available to accomplish the same result.

In the instant case a State has once again enacted a statute so broad that innocent parties (tenants with valid defenses) as well as potential wrong-doers (tenants holding over without claim of right) are penalized by its provisions. And here too, a valid alternative (Ga. Code Ann. §20-1404, providing expenses of litigation to plaintiffs victimized by bad-faith defendants) is available to prevent wrongdoing. As this court struck down the blunderbuss residency laws in *Shapiro,* so it should strike down the blunderbuss eviction laws here.

Over-breadth is not the only constitutional flaw in Georgia's eviction statute, grave though that flaw is. Georgia's statute creates at least one more discrimination that is perhaps even more constitutionally fatal, and that is the discrimination involved in restricting the right of all tenants—as opposed to all landlords and to all other litigants in Georgia—to defend themselves in court. It is this massive denial of access to the courts—a denial that affects every tenant in Georgia, be he individual or corporate, rich or poor, right or wrong—that constitutes the second, and perhaps the most constitutionally grave, defect in the Georgia eviction statute.

The opinion of Judge Osgood O. Williams in the trial of the instant case in the Civil Court of Fulton County dealt explicitly with this question, and concluded expressly that the State had selected an unconstitutional method to protect its landlords.

> Undoubtedly, it was the intent of the Legislature to protect the landlord against ill-founded or frivolous claims of the tenant. . . .
>
> In relation to conditions precedent, the courts have held as long as the basis of distinction is real and the condition imposed has a reasonable relation to a legitimate object, the State may without violating the Equal Protection Guaranty prescribe a reasonable and appropriate condition precedent to the bringing of an action of a specified kind or class which includes requiring the execution of a bond under certain circumstances. . . . Basically the Equal Protection of the laws of a State is extended to persons within its jurisdiction, within the meaning of the Constitutional requirement, when its courts are open to all with like rules and modes of procedure, for the security of their persons and property and the prevention and redress of wrongs. Equal Protection of the Law means that Equal Protection and security are given to all and this specifically includes the exemption from any greater burden or burdens that are imposed upon all others under like circumstances. (A. 31, 32)

Judge Williams' decision is not only well reasoned; it is supported by a long line of decisions that have held conclusively that

> The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist. *Gulf, C.&S.F. Ry.* v. *Ellis*, 165 U.S. 150, 162 (1896), quoting *Wilder* v. *Chicago & W.M. Ry.*, 70 Mich. 382, 384 (1888).

In *Hocking Valley Coal Co.* v. *Rosser,* 53 Ohio 12, 41 N.E. 263 (1893), for example, the Ohio Supreme Court declared unconstitutional a statute that allowed attorneys' fees for successful wage claimants but created no reciprocal right on the part of successful defendants. In validating the statute, the court said:

> Upon what principle can a rule of law rest which permits one party, or class of people, to invoke the action of our tribunals of justice at will, while the other party, or another class of citizens, does so at the peril of being mulct in an attorney fee, if an honest but unsuccessful defense should be interposed? *Id.* at 19; 41 N.E. at 264.

The court concluded:

> We do not think the general assembly has power to discriminate between persons or classes respecting the right to invoke the arbitrament of the courts in the adjustment of their respective right. . . . Where the penalty has been imposed for some tortious or negligent act, the statute has generally, though not always, been sustained; but, on the contrary, where no wrongful or negligent conduct was imputed to the defeated party, any attempt to charge him with a penalty has not prevailed. *Id.* at 20; 41 N.E. at 265.

And in *Davidson* v. *Jennings,* 27 Colo. 187, 60 P. 354 (1900), the Colorado Supreme Court struck down a similar attorneys' fee statute and said that

> Justice cannot be sold or denied by the exaction of a pecuniary consideration for its enjoyment from one, when it is given freely and open-handed to another,

without money and without price. Nor can it be permitted that litigants shall be debarred from the free exercise of this constitutional right [the right to be treated equally in the enforcement and defense of legal rights] by the imposition of arbitrary, unjust, and odious discriminations, perpetrated under color of establishing peculiar rules for a particular occupation. *Id.* at 190; 60 P. at 356.

This Court's most lucid enunciation of the theory articulated by Judge Williams and by the courts in the above cases may have been in *Gulf, C.&S.F. Ry., supra.* In striking down a statute that required railroads to pay attorneys' fees and court costs under certain circumstances but did not impose the same requirement on other litigants and did not make it possible for railroads to collect costs and fees under any conditions, the Court said that the statute was unconstitutional because it

> singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorneys' fees of the successful plaintiff; if it terminates in their favor, they recover no attorneys' fees. . . . *They do not enter the courts upon equal terms.* They must pay attorneys' fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties *they are discriminated against, and are not treated*

> *as others. They do not stand equal before the law.* They do not receive its equal protection. All this is obvious from a mere inspection of the statute. *Gulf, C.&S.F. Ry.* v. *Ellis,* 164 U.S. 150, 153 (1896). (Emphasis added)

Like the debtors in *Gulf,* tenants in Georgia have been singled out from all other possessors of property and are "mulcted" if litigation terminates adversely to them.*

And like the defendants in *Gulf,* defendants in the instant case are discriminated against in relation to plaintiffs, who are afforded a "special and important pecuniary advantage", *Gulf, supra,* at 162, which this court should not permit to stand.

Ga. Code Ann. §§61-303 and 61-305 do not provide a uniform remedy for landlords and tenants; i.e., landlords and tenants (1) "do not stand equal before the law" and (2) "do not enter the courts on equal terms" *Gulf, supra,* at 153. They are also discriminated against in relation to

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* It is interesting to note in this context that tenants, unlike all other Georgia possessors of property involved in litigation with owners of property, have indeed been singled out for special discriminatory treatment. Thus neither the bailment statute, Ga. Code Ann. §107-201, which deals with tangible property subject to removal from the jurisdiction, nor the intruder statute, Ga. Code Ann. §105-1501, which deals with occupants of property who have not even a colorable right to possession, permit the titleholder to recover double damages in the event of a successful recovery against a wrongful possessor. And neither of these statutes, each of which regulates the rights of owners whose property is in the hands of persons much more likely than tenants to cause damage or destruction, requires the possessor to post a bond as a precondition to going to court. A landlord thus enjoys a position of special privilege under Georgia laws which the legislature has denied to the owners of moveable, destructible personal property and to owners of land seeking to oust trespassers.

all other possessors who litigate against property owners. Finally, tenants are discriminated against under Georgia law because they must post a bond in court and suffer the attendant financial disadvantages even if they have a valid defense to an eviction action.

Appellants contend that these discriminations deny to all tenants the equal protection of the laws guaranteed by the United States Constitution. They urge this Court to so hold, and to declare unconstitutional Ga. Code Ann. §§61-303 and 61-305.

POINT II

Georgia Code Annotated §§61-303 and 61-305 Arbitrarily Discriminate Against Indigent Tenants in Violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The constitutionality of the Georgia eviction statute has been considered by this Court on a previous occasion. In *Williams* v. *Shaffer,* 385 U.S. 1037 (1967) the Court denied a petition for certiorari from the Supreme Court of Georgia's decision upholding the constitutionality of the statute because the tenants in that case, unlike the tenants in the instant case, had moved from the leased premises, rendering the case moot. In dissenting from the Court's denial of certiorari, MR. JUSTICE DOUGLAS described Georgia's law by stating that

> This case involves an important question regarding the right of a poor tenant to remain in possession of his shelter and defend against eviction in a court of law. It is part of the larger problem regarding the inability of indigent and deprived persons to voice

> their complaints through the existing institutional framework, and vividly demonstrates the disparity between the access of the affluent to the judicial machinery and that of the poor in violation of the Equal Protection Clause. *Williams* v. *Shaffer*, 385 U.S. at 1037 (dissenting opinion of Mr. Justice Douglas with whom Chief Justice Warren concurred).

MR. JUSTICE DOUGLAS' observation that the Georgia statute "vividly demonstrates" the denial of equal protection to poor people is apt and accurate. For if §§61-303 and 61-305 present a serious obstacle to *all* tenants, the obstacle they present to poor tenants is simply and absolutely insurmountable. As the trial judge in the instant case stated,

> The requirement that an indigent post a bond before he is granted a hearing is an impossibility. (A. 38)

It was this issue that the court below held to be "the crux of the case now before this tribunal"—a case that

> questions the validity of *a statute that denies an indigent defendant a hearing in a dispossessory proceeding, solely on account of his poverty.* The denial of the hearing stems directly from the defendant's impoverished circumstances which make it impossible for him to provide the required statutory bond. (A. 36) (Emphasis added)

Thirteen years ago this Court began to give content to the Equal Protection Clause insofar as it limits discrimination by a state on the basis of wealth. In *Griffin* v. *Illinois*, 351 U.S. 12 (1956), the Court began with the premise that

> Both equal protection and due process emphasize the central aim of our entire judicial system—all people

charged with crime mus
cerned, "stand on an equ so far as the law is con-
tice in every American cality before the bar of jus-
urt." *Id.* at 17.

It concluded that:

> There can be no equal ju
> a man gets depends on tice where the kind of trial
> *Id.* at 19. e amount of money he has.

On the basis of these princi
indigent state prisoner coul les this Court held that an
transcript, the transcript b not be denied a free trial
to appellate review of his ng in effect a prerequisite
Roberts v. *LaVallee*, 389 U onviction. And recently, in
affirmed *Griffin* with a broad . 40 (1967), this Court re-
the question of equal justice f statement of its position on

> Our decisions for more r indigents in criminal cases:
> clear that *differences i*
> *needed to vindicate lega* an a decade now have made
> financial situation of the *access to the instruments*
> the Constitution. *Rober rights*, when based upon the
> (Emphasis added). defendant, are repugnant to

s v. *LaVallee*, 389 U.S. at 42

In *Harper* v. *Virginia Bo*
(1966), this Court indicate *rd of Elections*, 383 U.S. 663
would not be limited to crim that the doctrine of *Griffin*
the State's requirement of al prosecutions. In that case
deny equal protection to th \$1.50 poll tax was held to
to pay it and were therefore se citizens who were unable
nable to vote.

As this Court noted in *Ha*
of wealth or property, like *per*, "lines drawn on the basis
tionally disfavored," for the those of race . . . are tradi-
"introduce a capricious or ir-

relevant factor" into the statutory scheme. *Id.* at 668. Because the Virginia poll tax statute under attack in *Harper* "makes affluence of the voter or payment of any fee an electoral standard," *id.* at 666, the Court held that it violated the Equal Protection Clause.

The capricious and irrelevant factor of affluence has not only been introduced into the Georgia statutory scheme; it is the very basis of it. MR. JUSTICE DOUGLAS recognized this fact when he commented in *Williams* v. *Shaffer* that the statute's

> effect is that an indigent tenant is deprived of his shelter, and the life of his family is disrupted—all without a hearing—solely because of his poverty. 385 U.S. 1037.

Judge Williams, too, understood the effect of the Georgia statute, and held expressly that it was unconstitutional because it discriminated against poor people. He held that

> The constitutional guarantee of equal protection of the laws is not subject to a construction which allows a man of means to defend his rights in court while denying the same opportunity to the indigent. The availability of the courts is necessarily open to all—both rich and poor alike. Equal protection of the laws does not permit as a condition precedent for access to the machinery of the courts a bond which a defendant is without means to procure (A. 38).

In *Harper* this Court described classifications based on wealth as "traditionally disfavored," and there held such a requirement "an 'invidious' discrimination . . . that runs afoul of the Equal Protection Clause". 383 U.S. at 668.

Similarly, the Court has

> long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 670.*

As this Court recently stated, where a classification "touches on [a] fundamental right . . . its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest." *Shapiro* v. *Thompson*, 394 U.S. 618, 638 (1969).

The Court's position on these two questions—the questions of "traditionally disfavored" categories and classifications that interfere with fundamental rights—has been summarized by the Harvard Law Review as follows:

> Thus, the cases indicate that when a fundamental interest is impaired or a suspect distinction drawn, the Court will demand a convincing demonstration that the classification is well tailored to achieve the statutory objective. . . . The State must show at least that this classification is more than just one of its goals. *Developments in The Law: Equal Protection*, 82 Harv. L. Rev. 1065, 1122 (1969).

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* *See also, Levy* v. *Louisiana*, 391 U.S. 68 (1968):

> [W]e have been extremely sensitive when it comes to basic civil rights (*Skinner* v. *Oklahoma*, *supra*, at 541; *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 669-770) and have not hesitated to strike down an invidious classification even though it had history and tradition on its side. (*Brown* v. *Board of Education*, 347 U.S. 483; *Harper* v. *Virginia Board of Elections*, *supra*, at 669.) 391 U.S. at 71.

The blatant discrimination effected by these statutes was underscored by the trial judge when he noted that

> The uncontradicted evidence in these proceedings show that the *defendants are indigent and unable to obtain bonds;* this situation takes on increasing importance when considered in the light of the evidence that during the year 1967 more than 19,000 dispossessory warrants were issued in Fulton County and the fact that defenses were actually interposed in merely 13 instances (A. 38). (Emphasis added.)

As Mr. Justice Douglas observed when Georgia's eviction statute appeared here last in *Williams* v. *Shaffer,* the Georgia eviction statute clearly creates that kind of "traditionally disfavored classification" that the Court discussed in *Harper.* Mr. Justice Douglas' observation is made all the more striking when read in connection with Judge Williams' opinion, in which the court made the specific finding that "the requirement that an indigent post a bond before he is granted a hearing is an impossibility." (A. 38) Because this case involves both a "traditionally disfavored" category *and* a "fundamental right" protected by the Due Process Clause, it is apparent that the case is a perfect example of the kind of case in which the state should be made to demonstrate, not merely a rational relationship between its statute and the law under attack, but that kind of compelling state interest that was found *not* to exist in *Shapiro, Skinner* and *Harper.*•

• Only once has this Court found a state interest sufficiently compelling to allow the state to encroach upon recognized fundamental rights. *Korematsu* v. *United States,* 323 U.S. 214 (1944); *see also, Hirabayashi* v. *United States,* 320 U.S. 81 (1943). Ap-

In the instant case, this Court need look no further than the opinion of the Supreme Court of Georgia below to understand the purpose of Georgia's statute. According to that court, the "main purpose" of the statute

> is to restore the landlord to the possession of the premises, and the imposition upon the tenant of a liability for double rent is an incident to the proceeding, and is in the nature of a penalty inflicted upon him for the wrong he has committed in refusing to deliver possession of the premises after demand is made upon him. *Willis* v. *Harrell,* 118 Ga. 906, 910, 45 S.E. 794, 795 (1903).

The question presented to this Court is therefore a simple one: is the State's interest in penalizing a tenant "for the wrong he has inflicted in refusing to deliver possession of the premises after demand is made upon him" so compelling that this Court should permit the State of Georgia to deny to indigents the fundamental right of access to the courts, and so compelling as to permit this Court to authorize Georgia to create a classification that effectively prevents indigents from challenging evictions?

Appellants submit that the State has not shown, and indeed could not show, any compelling justification for the enactment of the statutes here in question. Appellants submit in fact that there is not only no compelling interest to justify Georgia's eviction statute, but there is not even a rational relationship between the State's legitimate right to protect landowners from tenants holding over illegally

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pellants submit that Georgia's interest in protecting landlords is less compelling than the national interests that were at stake in the middle of the Second World War.

and the overkill it has employed in these laws. Accordingly, Appellants respectfully urge this Court to hold the statutes unconstitutional as a denial of the equal protection of the laws to all tenants, and in particular, as a denial of the equal protection of the laws to indigent tenants.

POINT III

Georgia Code Annotated §§61-303 and 61-305 Unconstitutionally Deny to Tenants in Georgia the Due Process of Law as Guaranteed by the Fourteenth Amendment to the United States Constitution.

A. The Georgia Statutes Deprive Tenants of Their Property Without the Procedural Right to Be Heard Guaranteed by the Due Process Clause.

The Fourteenth Amendment to the United States Constitution forbids any State to "deprive any person of life, liberty, or property without due process of law."

The crux of due process theory is that certain rights which are recognized as fundamental may not be restricted by the State in an arbitrary or unreasonable manner. *See, Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *Carrington* v. *Rash,* 380 U.S. 89 (1965); *NAACP* v. *Alabama,* 360 U.S. 240 (1959); *Adamson* v. *California,* 332 U.S. 46 (1947); *Betts* v. *Brady,* 316 U.S. 455 (1942); *Palko* v. *Connecticut,* 302 U.S. 319 (1937). The standard test for determining whether a given right is fundamental requires a determination of whether the right is within the basic values "implicit in the concept of ordered liberty." *Palko* v. *Connecticut,* 302 U.S. at 325 (Mr. Justice Cardozo). This requires

a balancing of the importance of the right to the individual against the relevant state interests. The question is whether

> the right involved is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Powell* v. *Alabama*, 287 U.S. 45, 67 (1932).

The "right to be heard" before judgment is a right that is fundamental to our entire concept of due process. *Schroeder* v. *New York*, 371 U.S. 208, 212 (1962). The case at bar poses the specific question: may a tenant be deprived of his shelter without being given the right to be heard.

Judge Williams in the court below recognized the fact that a Georgia tenant is wholly denied this right when he said:

> The Statute which requires a bond before appearing in court is an unconstitutional and unconscionable deprivation of the fundamental right to be heard where the defendant is unable to post such a bond. (A. 38).

For Judge Williams, the question of whether litigants are entitled to a hearing before judgment was not new. As he stated,

> It is the same question asked by St. John, 7:51, "Doth our law judge any man, before it hear him and know what he doeth?" (A. 38).

He answered the question by

> the rule of natural reason, expressed by Seneca 2,000 years ago:

> Qui statuit aliquid, parte inaudita altera, Aequum licet statuerit, haud aeguus fuit—He who determines any matter without hearing both sides, though he may have decided right, has not done justice. (A. 37). *See also, Hovey* v. *Elliott,* 167 U.S. 409 (1897).

The Civil Court of Fulton County is the court in which the vast majority of dispossessory warrants in Fulton County are brought. Judge Williams was thus well situated to observe the effect and operation of the statutes here in question. It is revealing indeed that a judge so placed felt compelled to hold these provisions inconsistent with the requirements of due process.

Judge Williams' opinion, courageous though it was, does not represent a novel point of view. This Court only last term provided strong support for the low-income would-be-litigant who is deprived of his property without the right to be heard.

In *Sniadach* v. *Family Finance Corporation,* —— U.S. ——, 37 U.S.L.W. 4520 (1969), this Court struck down a Wisconsin garnishment statute that allowed a debtor to be deprived of his wages before being afforded a hearing. The Court held that the debtor was unconstitutionally deprived of his earned wages, and that a prejudgment garnishment was "a taking of property without that procedural due process that is required by the Fourteenth Amendment." *Id.* at —, 37 U.S.L.W. at 4521.

Wisconsin's garnishment statute only deprived the debtor of the enjoyment of his wages temporarily, for that statute made a hearing available to the debtor as a matter of right *after* the initial garnishment action. Georgia's

double bond provisions, however, permanently and finally divest the tenant of his property.

In *Sniadach,* the Court found:

> that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage earning family to the wall. *Id.* at —, 37 U.S.L.W. at 4521.

In the instant case, the taking may as a practical matter not only drive a family to the wall, it will drive them out from under their roof as well, and into the very streets of our cities and towns.

Mr. Justice Douglas, writing for the Court in *Sniadach,* explicitly dealt with the fundamental nature of wages, "a specialized type of property presenting distinct problems in our economic system," and noted that "a prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support." *Id.* at —, 37 U.S.L.W. at 4520. Mr. Justice Douglas was especially concerned with the "grave injustices made possible by prejudgment garnishment whereby the sole opportunity to be heard comes after the taking." *Id.* at —, 37 U.S.L.W. at 4521.

This language is particularly applicable to the instant case, for there is no property that poses more "distinct problems in our economic system" than shelter for one's family—"The greatest material need of the poor" *—and no injustice more grave than the taking of this shelter with no hearing at all.

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* P. Wald, Law and Poverty 1965, 12 (Report to the National Conference on Law and Poverty, Washington, D. C., June 23-25, 1965).

The United States Congress first recognized the fundamental importance of housing with the passage of the Housing Act of 1949, wherein Congress expressly declared that one of America's national goals was to make available "a decent home and suitable environment for every American family." (Act of July 15, 1949, Ch. 338, 63 Stat. 413.) In introducing legislation in 1968 to achieve that still-unaccomplished goal, President Lyndon Johnson noted that "five Presidents and fifteen Congresses" have dealt with the problems of housing and urban development, starting

> in 1937, when Franklin Roosevelt saw a third of the nation ill-housed. He and the 75th Congress recognized that poor families could not, with their own resources, afford homes on the private market, and that some form of Government help was necessary if they were to have decent shelter. The result was the historic legislation that launched the Public Housing Program.

President Johnson pointed out that every subsequent administration had honored President Roosevelt's 1937 commitment:

> Twelve years later, with the Housing Act of 1949, President Truman and the 81st Congress started urban renewal and pledged "as soon as feasible . . . a decent home and a suitable living environment for every American family."
>
> In the 1954 Housing Act, President Eisenhower and the 83rd Congress expanded the program of urban renewal.
>
> At the beginning of this decade, President Kennedy and the 87th Congress enlarged the Government's role to bring decent houses into the reach of families with

moderate income. President's Message of February 22, 1968, *Houses and Cities,* U.S. Code Cong. and Admin. News, No. 2, 520 (April 5, 1968).

Most recently, the House of Representatives Committee on Banking and Currency underlined its belief in the fundamental importance of housing when it stated, in reporting out the Housing Act of 1968:

> The Housing and Urban Development Act of 1968 as approved by the committee reaffirms our national housing goals and makes extensive modifications and additions to our housing programs to accelerate progress. Since the declaration in the 1949 act that our national objective was "a decent home and a suitable living environment for every American family" our country has invested heavily in the production of housing for low and moderate income families and in the improvement of our towns and cities. H. R. Rep. No. 1585, 90th Cong. 2d Sess. (1968); reprinted at 2 U.S. Code Cong. and Admin. News 2873 (90th Cong. 2d Sess. 1968)

The House Committee noted, in language that is particularly relevant to the instant case, that

> A basic factor in the magnitude and urgency of our present housing problems has been the failure to include all parts of our population in the general rise in incomes and wealth. In fact this growth of prosperity has accentuated and may have even widened the gap between the poverty of the approximately 6 million families who still live in substandard housing and the affluent majority. Because of this contrast and the

> unrest it has created, the task of our housing and urban development programs is more critical than ever. *Id.* at 2873, 2874.

Like Presidents and Congressmen, writers and scholars have also underlined the fundamental importance of housing in our national life. Focussing on the psychological effects of housing, for example, Professor Alvin Schorr has noted that

> The evidence makes it clear that housing affects perception of one's self, contributes to or relieves stress and affects health. In myriad ways, housing affects ability to improve one's circumstances . . . . A. SCHORR, SLUMS AND SOCIAL INSECURITY 3 (1966).

Professor Schorr also observed (citing a recent study by the New York University Center for Human Relations and Community Studies) that

> Housing . . . has represented much more than physical structures. Housing is . . . a subject of highly charged emotional content: a matter of strong feeling. It is the symbol of status, of achievement, of social acceptance. It seems to control, in large measure, the way in which the individual, the family, perceives him/itself and is perceived by others. SCHORR at 9 (Report of the Chelsea Housing and Human Relations Cooperative Project 60 (1960)).

And focussing on the importance of housing for poor people—as have many other commentators*—Professor

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* *See, e.g.*, M. HARRINGTON, THE OTHER AMERICA (1962); PERMAN, THE GIRARD STREET PROJECT (1964) (Report to All Souls Unitarian Church, Washington, D. C.); P. WALD, LAW AND POV-

Carl Scheier has concisely summed up the situation by stating that

> The person with inadequate means, seeking a suitable family dwelling in the city, is often a hapless figure. Space can be had only on a short-term basis, and most available housing is run-down, dirty, and without adequate services. Furthermore, if the community is progressive and in the throes of redevelopment, one never knows when the neighborhood will be slated for wholesale destruction. Hence, many poor families are little better than transients within the metropolis, resettling periodically in one blighted area or another.*

As these commentators, Congressmen, and Presidents of the United States have pointed out, there is scarcely an area of American life as fundamental as that of housing. Their observations demonstrate that a tenant's interest in his home is more than a simple property right. Rather it is a right that involves "a specialized type of property," one that presents severe problems not only for our economic system but for our social system as well. *See Sniadach* v. *Family Finance Corp.*, —— U.S. ——, 37 U.S.L.W. 4520 (1969). And if, as the Court observed in *Sniadach*,

> A prejudgment taking of the Wisconsin type may impose tremendous hardship on wage earners with families to support, *Ibid*,

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ERTY, 1965; Rostow, The Social Effect of the Physical Environment, 27 J. of American Institute of Planners 127 (1961); *See generally*, Housing for the Poor: Rights and Remedies (1967) (Project on Social Welfare Law, N.Y.U. School of Law).

* C. Scheier, Protecting the Interests of the Indigent Tenant: Two Approaches, in THE LAW OF THE POOR 346 (J. tenBroek, ed. 1966).

the staggering hardship imposed on families who are evicted with no opportunity to defend themselves can scarcely be described.

It is interesting to observe in this context one aspect of the social consequences of Georgia's oppressive eviction law. Because Georgia's law makes it impossible for tenants to challenge a landlord's demand for the instant possession of his property, tenants in Georgia have been largely unable to raise any serious challenge to the continued existence of slums. Such a challenge, whether it takes the form of reports to City inspectors of housing code violations or utilizes any of the other techniques tenants elsewhere in the country have developed to force landlords to meet their legal responsibilities, it is impossible in Georgia.

Fear of retaliatory evictions makes tenants unable to assert their rights—or even to ask local government officials to enforce local housing codes—and leased housing thus remains in disrepair for generations. The Georgia eviction statute is at least partially responsible for the fact that Atlanta has one of the highest percentages of substandard housing of any large city in the country.*

Sections 61-303 and 61-305 make it possible for landlords to evict tenants summarily and make it effectively impossible for tenants to obtain a hearing to contest their eviction. Because this Court has held that the Due Process Clause requires a hearing before depriving any person of

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* In 1960, the Housing and Home Finance Agency found that, in the 20 American cities with the largest non-white population, 25.6% of the total non-white occupied rental units were substandard. Atlanta's percentage of non-white occupied substandard rental units was among the highest in the country at *42.4%*. Fossum, *Rent Withholding and the Improvement of Substandard Housing*, 53 Calif. L. Rev. 304, 307 n. 14 (1965).

his property, Appellants urge this Court to hold unconstitutional Ga. Code Ann. §§61-303 and 61-305.

B. The Georgia Statutes Deprive Tenants of the Fundamental Right to Litigate Guaranteed by the Due Process Clause.

One of the rights specifically protected by the First Amendment to the U. S. Constitution is the right of the people "to petition the Government for a redress of grievances." See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 276-77 (1964) and cases there cited.

In a series of recent cases, this Court has recognized that litigation is a form of petition for judicial redress of grievances. Beginning with *NAACP* v. *Button*, 371 U.S. 415 (1963) this Court made clear that the right to repair to the courts for a resolution of grievances is included within the freedoms of expression protected against federal and state intrusions. Indeed,

> [U]nder the conditions of modern government, litigation may be the sole practicable avenue open to a minority to petition for redress of grievances. 371 U.S. at 430.

In *Button* the NAACP's activities in advising Negroes of their constitutional rights, encouraging the assertion of such rights through litigation and providing lawyers and financing for the conduct of the litigation, was held more important than Virginia's interest in regulating the practice of law. The Court referred to First Amendment rights to enforce constitutional rights through litigation (371 U.S. at 440), and its opinion emphasized the importance of litigation as a "means for achieving the lawful objectives of

equality of treatment by all governments, federal, state and local. . . ." 371 U.S. at 429.

Subsequently, in *Brotherhood of Railroad Trainmen* v. *Virginia Bar,* 377 U.S. 1 (1964), the Court vindicated the right of a labor union to advise injured members to obtain legal representation and to recommend specific lawyers to provide the representation.

The litigation concerned in the *Trainmen* case was not of constitutional scale; it was not the kind of "political expression," the Court found present in *Button,* 371 U.S. at 429. It merely involved suits for money recovery, for damages suffered. Yet there too the Court held:

> The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. *The right to petition the courts cannot be so handicapped. Trainmen,* 377 U.S. at 7. (Emphasis added.)

In *United Mine Workers* v. *Illinois Bar,* 389 U.S. 217 (1967), this Court dealt with an attempt by the Illinois Supreme Court to restrict the decisions in *Trainmen* and *Button.* In rejecting the Illinois court's narrow interpretation of those cases, this Court stated:

> We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. 389 U.S. at 222.

The Court noted that these rights were endangered as much by "indirect restraints" as by laws specifically prohibiting

their exercise, and said that even legislation "enacted for the purpose of dealing with some evil within the State's legislative competence . . . [and] in fact provid[ing] a helpful means of dealing with such an evil" cannot be sustained if it "actually affect[s] the exercise of these vital rights." 389 U.S. at 222.

Invoking these principles, the Court squarely held

> that the freedom of speech, assembly, and *petition* guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights. 389 U.S. at 221-22. (Emphasis added.)

Button, Trainmen and *United Mine Workers* establish the existence of a Federal constitutional right, protected by the First and Fourteenth Amendments, to litigate, to petition the courts for a redress of grievances.

Appellants do not contend that the right to litigate knows no bounds. This right is, however, of sufficient importance to require a state to show (1) a compelling State interest in order to deny the right, and (2) that denial of the right is not "pursued by means that *broadly* stifle fundamental personal liberties." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960); and *See Bates* v. *Little Rock,* 361 U.S. 516 (1960).

The interests propounded by the State in the instant case are not of sufficient importance to allow for blanket denial of the right to litigate for all tenants. Protection of the landlord's interest in continued rent collection can be achieved by a restriction far narrower than one which excludes from the courts those who cannot purchase a double bond. Thus, the legislature and the courts have too broadly restricted the right to litigate in eviction actions.

Appellants respectfully urge this Court to hold that this unreasonable and arbitrary denial of a fundamental right —the right of access to the courts—is prescribed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

C. The Georgia Eviction Statutes Set Out a Vague and Incomprehensible Standard Allowing for Drastic Differences in Interpretation, in Violation of the Due Process Clause.

Georgia Code Section 61-305, when read in conjunction with Section 61-303, requires as a precondition to the tenant's defending a summary eviction a bond equal to "double the rent reserved or stipulated to be paid." This language, which has never been interpreted by a Georgia court, provides no intelligible criteria for the amount of money or the period of time the bond is to cover. Thus, the amount of the bond is left in the frequently arbitrary hands of court clerks, sheriffs and justices of the peace.

In Fulton County, as a general rule, the clerk of the Civil Court demands a bond to cover double the rent that will accrue during the six months after the bond is filed—an amount equal to one full year's rent. In DeKalb County, the tenant must supply an open-ended bond, i.e., a bond that will remain indefinite as to time and amount until final judgment is rendered.

The practice in Chatham County, however, best illustrates the confusion created by Georgia Code §61-305. In Chatham, both the Municipal Court and City Court of Savannah have jurisdiction over summary eviction actions. While the Municipal Court requires an open-ended bond similar to DeKalb's, the City Court demands that the bond

cover only double the amount allegedly due at the time the bond is sworn out. Thus, two courts in the same jurisdiction* have reached drastically different conclusions as to the meaning of statutory language.

Not only does the language of the statute allow varying interpretations as to time and amount, it also fails to specify who is to make the interpretation. In Fulton and DeKalb Counties, the amount of bond is determined by court clerks, while in Gwinnett and Chatham Counties the county sheriff makes the determination. Every aspect of Georgia's eviction statutes is open to conflicting constructions.

The classical test for vagueness was promulgated in *Connally* v. *General Construction Co.*, 269 U.S. 385, 392 (1926), wherein MR. JUSTICE SUTHERLAND said:

> A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

The Georgia laws that make possible the boundless administrative discretion described above clearly do not afford the "first essential of due process of law."

Although the majority of cases declaring statutes void for vagueness have involved criminal and regulatory provisions, this Court has not hesitated to extend the requirement of definiteness to civil matters. In *NAACP* v. *Button*, 371 U.S. 415 (1963), MR. JUSTICE BRENNAN rejected the

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* In fact, both courts are located in the same building in Savannah.

notion that the void for vagueness doctrine did not apply because of the "civil" nature of the anti-solicitation statute, saying:

> It makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement. 371 U.S. at 432.

And in *Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966), this Court struck down a statute allowing a jury to assess costs against a defendant acquitted of misdemeanor charges, because the statute lacked definite standards to govern the jury's determination. MR. JUSTICE BLACK, writing for the majority, squarely met the argument that collection of costs was a civil matter and stated that:

> Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to foster upon its conduct or its statute. So here this state Act whether labelled "penal" or not must meet the challenge that it is unconstitutionally vague. 382 U.S. at 402.

Any statute, either civil or criminal, "must be one that carries an understandable meaning with legal standards that courts must enforce." *Giaccio,* 382 U.S. at 403. MR. JUSTICE FRANKFURTER, concurring in *Brown* v. *Allen,* 344 U.S. 443 (1953), was emphatic in his demand for such standards.

> [D]iscretion must be judicial discretion. It must be subject to rational criteria, by which particular situations may be adjudged. 344 U.S. at 496.

The criteria for the exercise of discretion must not be "merely a shelter for . . . judges [or, in the instant case, county sheriffs] to respond according to the individual will," for,

> Discretion without a criterion for its exercise is authorization of arbitrariness. *Ibid.*

The language of Georgia Code §61-305, requiring a bond equal to "double the rent reserved or stipulated to be paid," fails to set out any legal standards that courts can enforce. While this provision confers upon sheriffs and court clerks, instead of juries as in *Giaccio,* boundless discretion as to the amount a litigant can be deprived of, the result is equally burdensome. A tenant is stripped of his property, and excluded from the courts by statutory language allowing an interpretation so unreasonable that compliance is impossible.

In *Cramp* v. *Board of Public Instruction,* 368 U.S. 278 (1961), this Court struck down a vague Florida statute requiring a state employee to swear that he had not in the past and would not in the future give aid and support to the Communist Party. After holding that such conduct is constitutionally protected under many circumstances, MR. JUSTICE STEWART said:

> The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution. 368 U.S. at 287.

MR. JUSTICE STEWART was directly referring to First Amendment freedoms, which traditionally have demanded

zealous protection when lack of certainty threatens to inhibit their exercise. Cf. *American Communications Association* v. *Douds*, 339 U.S. 382 (1950); *NAACP* v. *Button*, 371 U.S. 415 (1963). This requirement, however, is no less necessary where the threatened right involves access to the courts, a fundamental liberty affirmatively protected by the Constitution.

Appellants contend that Georgia Code §61-305 consists of meaningless language setting forth no legally enforceable standards, and is thus void for vagueness under the Due Process Clause of the Fourteenth Amendment.

Conclusion

For the foregoing reasons, Appellants respectfully request this Court to reverse the judgment of the Georgia Supreme Court and remand the cases herein to the Civil Court of Fulton County for trial on the merits.

Respectfully submitted,

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